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No. 00-231

IN THE

Supreme Court of the United States

HANDICOMP, INC.,
a Michigan corporation,

Petitioner,

v.

UNITED STATES GOLF ASSOCIATION,
a Delaware corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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STATEMENT

In its opposition brief, USGA does not address critical facts and issues raised in the petition. Additionally, many of the "facts" recited by USGA have been taken out of context.

Summary judgment was entered against Handicomp despite a considerable body of evidence showing that USGA has acquired a 72%+ monopoly share of the market for golf handicap computation services by abusing its rulemaking power and its role as the governing body of golf in the United States, resulting in higher prices and lower quality to consumers. The only avenue by which USGA can avoid having to answer for the consequences of its illegal actions is to claim that the acts it committed occurred outside the four year limitations period. This argument is demonstrably groundless because many of the illegal acts occurred within the four year limitations period and they continue to this day. USGA's actions, both before and during the limitations period, are part of an ongoing conspiracy between the USGA and its regional golf association surrogates, beginning in 1981, to monopolize the national market for golf handicap computation services. USGA prevailed in the courts below by convincing them to disregard relevant facts and controlling Supreme Court precedents, including *Continental Ore Company v. Union Carbide and Carbon Corporation*, 370 U.S. 317 (1962) and *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 472 U.S. 585 (1985) and by misconstruing this Court's decision in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997).

1. Statute of Limitations.

The threshold issue is whether the acts upon which the complaint is based occurred wholly outside the limitations period. They manifestly did not.

There is abundant evidence showing that USGA intended to illegally use its power as golf's governing body to monopolize the market for handicap computation services dating from the inception of GHIN. McKinsey Study, A-361-406; GHIN Feasibility Study, A-321; Easterly Letter, A-2079. This evidence is relevant to show USGA's illegal intent,

motive and purpose which continue to this day. The district court refused to consider this evidence because the acts *occurred* outside the limitations period. Pet. App. 19a-20a. This was reversible error. *Continental Ore Company v. Union Carbide and Carbon Corporation*, 370 U.S. at 709-10 and n.15 [exclusion of evidence predating the limitations period was error where the evidence was material to claim of conspiracy and monopolization]; *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 75-76 (1911) [evidence of defendant's acts in 1879-1882, *before passage of the Sherman Act* in 1890, was necessary to determine the intent or purpose of the founders of Standard Oil]; and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1967) [defendant's conduct "inflicted continuing and accumulating harm" and although plaintiff could have sued in 1912, it was equally entitled to sue in 1955].

Even so, there is much evidence showing that USGA actually *committed* anticompetitive acts *within the limitations period*. For example: The evidence shows that USGA improperly used its power as golf's governing body to create the Metropolitan Amateur Golf Association [MAGA] in St. Louis precisely so that MAGA could become a GHIN customer. This had the effect of destroying Handicomp's business in the St. Louis area. A-2152-53; A-1957-58. This happened in 1993, well within the limitations period. USGA improperly leveraged its power as golf's governing body to foreclose all competition for the handicapping business of the Kentucky Golf Association ["KGA"], even though KGA officials *confirmed* that USGA's GHIN service was both inferior to and more expensive than competing services. A-2013-17; A-1998; A-2001; A-2006; A-2010. No GHIN competitor was given a meaningful opportunity to compete for this business. This happened in 1995, *well within the limitations period.*

USGA continues today to give its GHIN handicap service advance notice of handicap rules changes so that GHIN can schedule and even budget for the programming revisions that will be required. In some cases, USGA has put off changing

the USGA Handicap System rules, because the changes would be disruptive to GHIN's business. GHIN's competitors do not receive these advantages from the sport's governing body, instead they are repeatedly put at a competitive disadvantage as they are forced to disrupt their operations and incur significant unplanned costs in order to reprogram on short notice to accommodate USGA's rules changes. A-2132-34; A-458-59; A-1966-67; A-2107; A-456; A-1928-29; A-317-18; A-1928-29. The latest in a long line of rule changes occurred in the fall 1997, *well within the limitations period.*

These are but a few of the damaging acts committed by USGA *within the limitations period,* in furtherance of the plan hatched in the early 1980s to monopolize the market. After the district judge said he would not consider acts that occurred in the pre-limitations period, he then impermissibly compartmentalized (the district judge's own word (T.32:11-13)) the evidence of acts committed by USGA within the limitations period and concluded that, standing alone, they did not support Handicomp's monopoly claim. By compartmentalizing and examining each act in isolation, the district court erroneously concluded that Handicomp had not shown specific harm resulting from each and they were, therefore, to be disregarded. Pet. App. 29a-30a. This is *precisely* the type of evidentiary dissection that was held to be inappropriate in antitrust cases and condemned by the Supreme Court in *Continental Ore.*

USGA's and the district court's reliance on *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) is misplaced. *Klehr* is not applicable to a case such as this one where the illegal conduct occurred within the limitations period. Furthermore, *Klehr* is inapposite to an antitrust case involving a long-term conspiracy to monopolize a market. The interpretation given *Klehr* by the district court (*Klehr* was a RICO case and not an antitrust continuing conspiracy case), if applied to antitrust cases involving continuing conspiracies, will result in the overturning of long-established Supreme Court precedent, including *Hanover Shoe, Inc. v. United Shoe Machinery Corp, supra* and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321,

338 (1971). The rule unquestionably is that acts committed *within* the limitations period (the case here) start the statute running again. *Klehr v. A.O. Smith Corporation*, 521 U.S. at 189.

The pre-limitations period evidence is highly relevant and should not have been disregarded by the courts below. Once evidence of antitrust activity by USGA *within* the limitations period was presented, the statute of limitations defense could not be dispositive of the case on a summary judgment motion. The Supreme Court should grant the petition in order to correct the misapplication of *Klehr* by the district court.[1]

2. Monopoly Power.

a. Barriers to Entry.

The lower courts' finding that USGA lacks market power — and USGA's argument supporting the conclusion — is based on a superficial and fundamentally flawed analysis that failed to consider evidence showing that barriers to entry are high. The focus of the courts below was solely on whether it is difficult to create a software program that can calculate a golf handicap. In its brief, USGA focuses on a statement made by Handicomp's president in his deposition that it is not difficult to create such a program and, therefore, barriers to entry must, necessarily, be low. This ignores the fact that the ease or difficulty associated with writing a software program to calculate a golf handicap is only one of the elements needed to crack the golf association

1. USGA attempts to make much of the district court's refusal to allow Handicomp to amend the complaint to include a fraudulent concealment count. USGA argues that when Handicomp's motion to amend was denied, USGA automatically prevailed on its statute of limitations defense. This is, quite simply, wrong. A fraudulent concealment claim would have served only to open up the damages period to include acts committed prior to the limitations period. In other words, Handicomp's damages would have increased. The fraudulent concealment claim had nothing whatsoever to do with the damages caused Handicomp either as a result of USGA acts *committed* within the limitations period or as a result of harm caused by the long term conspiracy continuing into the limitations period.

handicap market. The courts below — and USGA in its opposition brief — disregarded the substantial evidence which shows that barriers to entry into the relevant market are virtually insurmountable.

Evidence of high entry barriers was presented to but ignored by the courts below. The Third Circuit's narrow inquiry into whether it is easy to write a handicap computation program is at odds with the thorough and sensible analysis employed by the Tenth Circuit in *Reazin v. Blue Cross and Blue Shield*, 899 F.2d 951 (10th Cir. 1990). Important indicators of entry barriers overlooked by the Third Circuit include the existence of legal license, control over an essential or superior resource and entrenched buyer preferences. *Id.* at 968. The record shows that these barriers exist in the relevant marketplace. They are referred to in Handicomp's Petition at pp. 4-5 and 19 and ignored by USGA in its brief.[2]

The strongest evidence of high entry barriers is the fact that *no new firms have entered this market since 1986* and competition has been reduced from approximately 40 to the four firms that survive today. A-2067, 2006, 1949. In addition to the direct evidence of high entry barriers, logic alone suggests that if entry barriers are low — as USGA claims and as the courts below found — there would have been at *least some new entrants* to the market in the last 14 years.[3]

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2. USGA says that Handicomp cited *Reazin* in the court of appeals only in support of its contention that market power may be inferred from high market share alone. This is not true. Handicomp's brief in the court of appeals says that, *in addition to market share*, "when other special market conditions are considered, such as concentration of market, high entry barriers and consumer demand, monopoly power must be presumed where a firm has a 70%+ market share." Br. p. 45. Handicomp has made this argument consistently throughout.

3. USGA says that market entry is easy because, on one occasion, the Southern California Golf Association (a non-GHIN association) actually accepted proposals from some firms who were not then in the market and never subsequently entered it. The fact that some firms may have tried to gain entry and were locked out is evidence of entry barriers, not the easy market access that USGA says exists.

b. *High Market Share.*

In addition to evidence of high entry barriers, the evidence shows that USGA has a 72%+ market share which should have led the courts below to find at least an inference of monopoly power sufficient to withstand summary judgment. *See Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171 (3rd Cir. 1992) ["existence of [market] power ordinarily may be inferred from the predominant share of the market."], *citing*, *American Tobacco Co. v. United States*, 328 U.S. 781 (1946) ["over two-thirds of the entire domestic field of cigarettes, and over 80% of the field of comparable cigarettes constituted a 'substantial monopoly'."]

c. *High Market Concentration.*

A highly concentrated market is one factor that militates in favor of a finding that a firm with a predominant market share has monopoly power. *See Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 490 (5th Cir. 1984). The courts below did not acknowledge that market concentration is relevant, much less that this market is highly concentrated. Not only does USGA control the market, its 72%+ market share is *9 times greater* than the 8% share held by its next closest competitor. USGA's dramatically high market share in a highly concentrated market is strong evidence of monopoly power. *See e.g.*, *Fineman v. Armstrong World Industries, Inc.*, 980 F.2d at 202.

d. *Consumer Demand.*

High consumer demand is another element of market power that USGA refuses to address. *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, *supra*. Consumer demand for GHIN is very high, although artificially created. It derives from factors that are totally unrelated to quality and price. In fact, consumer demand for GHIN is high *in spite of its low quality and high price*. The record facts cited throughout the petition show that demand for GHIN derives from the prestige that regional associations acquire by being associated with the governing body of golf and by USGA allowing its GHIN customers to use USGA's trademarks, giving regional association officials highly coveted seats on USGA's many committees, fostering the false

notion that one must have a handicap from GHIN in order to have a valid USGA Handicap, falsely claiming that GHIN is the only handicap service that is always in compliance with USGA handicap rules and, most significantly, USGA's stunning policy of kicking back all GHIN profits to its GHIN customers.[4] This level of consumer demand is additional strong evidence of USGA's market power. *Id.*[5]

3. Anticompetitive Conduct.

USGA claims there is no evidence of anticompetitive conduct. The courts below agreed, but they inexplicably gave no consideration to the many actions committed by USGA that foreclosed competition. These acts include abusing its rule making power by manipulating the rules of golf to give GHIN competitive advantages and negate innovations by competitors and by intentionally using its power as golf's governing body to destroy firms who were viewed as potential GHIN competitors. These are but two of the anticompetitive activities engaged in by USGA that are designed to give GHIN unfair competitive advantages, facts which were ignored by the courts below and by USGA in its brief. Yet, the Supreme Court has specifically said that abuses by standard-setting organizations

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4. Although GHIN profits are kicked back to the associations, GHIN's price remains higher than competitor's and the cost to the end-user — the golfer-consumer at the club level — remains well above the prices a competitive market would otherwise yield.

5. USGA claims that its own customer surveys suggest that GHIN users are generally happy with GHIN and they consider it to be priced "about right." Opp. Br. 6 n.5. This is to be expected from customers who are beholden to USGA for their very existence as USGA-authorized golf associations, whose officials sit on prestigious USGA committees, including its Executive Committee, and who, as a consequence, regularly rebuff marketing proposals from GHIN's competitors. The GHIN associations have no way of knowing what the competition's attributes and prices are. When the Kentucky Golf Association actually thought seriously about making a change because GHIN was inferior and more expensive, the risk that KGA would be viewed as anti-USGA carried the day and KGA stayed with GHIN despite the additional $30,000 in annual costs this small association would incur.

like USGA constitute "anticompetitive activity." *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 472 U.S. at 571.

USGA ignores these anticompetitive acts and instead quotes selectively from the deposition transcript of Patricia Healey and Lisa Postma, the wife and daughter, respectively, of Handicomp's founder, to show that these two individuals did not identify anti-competitive activities by USGA. But these two individuals were home office workers who had minimal involvement in the marketing of Handicomp and little occasion to know the details of USGA's actions. A-1026-4. USGA also quotes from the deposition transcript of one of Handicomp's experts to the same effect. This expert was not, however, retained to opine on USGA's anticompetitive conduct. A-208.

The flimsy basis for USGA's assertion that no anticompetitive conduct was committed does not nullify the substantial evidence in the record that supports the opposite conclusion. A-1945-69, A-1925-1. It is this evidence in support of Handicomp's claims that should have carried the day on USGA's summary judgment motion.

4. Antitrust Injury.

USGA misstates the basis for Handicomp's damage claims. It is the same erroneous reasoning that the district court adopted.

Handicomp's damages expert, Dr. Upton, concluded that Handicomp's injury resulted from the fact that GHIN's marketing was completely dependent upon and tied up with USGA's role as golf's governing body. They were inseparable. Handicomp's damages did not result, as USGA claims, merely from the fact that GHIN competes against it. In his report, Dr. Upton says that "[t]he GHIN system was marketed through a series of anticompetitive practices by USGA." A-466, 488. These are so pervasive and firmly tied to USGA's governing body role that *GHIN does not have to compete on the merits* like other handicap services. Dr. Upton concluded that GHIN would have failed without USGA's misuse of its rulemaking power, prestige and large financial subsidies. A-509-11. This case is not

governed by *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977) as USGA contends and as the district court erroneously held. In *Brunswick*, the plaintiffs would have suffered exactly the same injury even if the bowling alleys were run by an independent third party. Not so here. Without USGA's improper influence, GHIN would and should have failed.[6]

Finally, USGA says there is no requirement that a standard setter be held to a heightened level of antitrust scrutiny when it does business in the industry where it makes the rules. The cases governing the liability of standard setters suggest otherwise. The Supreme Court has said:

> [A] standard-setting organization . . . can be rife with opportunities for anticompetitive activity. Many of [the organization's] officials are associated with members of the industries regulated by [the organization's] codes.

and

> Thus, a rule which imposes liability on the standard-setting organization — which is best situated to prevent antitrust violations through the abuse of its reputation — is most faithful to the congressional intent that the private right of action deter antitrust violations.

American Soc. of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. at 571 and 572-573. For the same reasons, USGA's GHIN business requires a heightened level of antitrust scrutiny.

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6. USGA claims that because its wrongful actions resulted in the artificial depression of Handicomp's prices by some 25%, Handicomp did not suffer antitrust injury. This is not legally supportable. USGA has persistently refused to address Handicomp's argument that, even if Handicomp's prices were 25% higher, they would still have been lower than GHIN's, thereby resulting in a higher quality service at less cost to the consumer. Pet. 23-24. As stated in the petition, the Supreme Court has held that a "defendants' wrongful acts and their tendency to injure plaintiffs' business" followed by a "*decline in prices*, profits and values, not shown to be attributable to other causes" evidences antitrust injury. *Zenith Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969) [emphasis added].

CONCLUSION

This antitrust case was dismissed on a motion for summary judgment because the courts below disregarded relevant facts and ignored or misconstrued controlling Supreme Court precedent. Unless these serious errors are corrected by the Supreme Court, an existing national monopoly will be allowed to spread at the expense of both competition and consumers. This will assuredly result in the 100% takeover of the market that USGA's Director of GHIN projected GHIN will achieve by 2002. A-2136. The Petition for Certiorari should be granted to correct the errors of the courts below and to vindicate the rules of antitrust law enunciated by this Court.

Respectfully submitted,

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